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NO. 84-1889

In the Supreme Court of the United States

OCTOBER TERM, 1985

GLENDA MERWINE

Petitioner

VERSUS

BOARD OF TRUSTEES FOR STATE INSTITUTIONS OF HIGHER LEARNING, ET AL,

Respondents

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

NUMBER 84-4036

Decided March 8, 1985

Reported in 754 F.2d 631

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TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 3

Argument 5

I. Disparate Impact 5
II. Standard of Review 8
III. Manifest Relationship of the Requirement 9

Conclusion 13

Certificate of Service 14

TABLE OF AUTHORITIES

Connecticut v. Teal, 457 US 440
102 S.Ct. 2525 (1984), 73 L.Ed. 2d.
130 (1972) 4, 6, 10

Elliott v. Group Medical and Surgical Service,
714 F.2d 556, 564, (5th Cir. 1983) 9

Lyford v. Schilling 750 F.2d 1341,
(5th Cir. 1985) 9

Merwine v. Board of Trustees,et al, 754 F.2d
631, 639, 640 (5th Cir. 1985)..... 5, 6, 11, 12

Payne v. Travenol Laboratories, Inc., 565,
F.2d 895, 898-99, (5th Cir.) cert. denied,
439 U.S. 835, 58 L.Ed.2d 131 (1978) 7

Reeves v. General Foods Corporation, 682
F.2d 515, 519, (5th Cir. 1982) 9

U.S. Postal Service Board of Governors v.
Aikens, 460 US 711, 716, 75 L.Ed.2d 403,
411 (1983) 8

Williams v. Southwestern Bell Telephone Co.
718 F.2d 715, 717, 718, (5th Cir. 1983) 8

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OPINIONS BELOW

The opinions of the lower courts are adequately presented in the text of the petition.[1]

JURISDICTION

The judgment of the Court of Appeals was entered March 8, 1985. Jurisdiction of this Court is invoked under 28 U.S.C. §2101(c).

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[1] The American Library Association received permission but elected not to file amicus curiae briefs in this cause.

QUESTIONS PRESENTED

I.

Whether the District Court and Court of Appeals findings and opinions on disparate impact are in conflict with this Court or another court of appeals or constitutes a radical departure from accepted judicial proceedings.

II.

Whether the District Court and Court of Appeals consideration of the merits have so far departed from the accepted and usual judicial proceedings as to call for an exercise of this Court's power of supervision.

III.

Whether the District Court and Court of Appeals findings and opinions on manifest job relatedness are in conflict with this Court or another court of appeals or constitutes a radical departure from accepted judicial proceedings.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Statutes involved in the case are adequately presented in the petition.

STATEMENT OF THE CASE

In 1978 Mississippi State University, upon recommendation of the Library faculty, adopted a policy that faculty librarians being appointed should have appropriate terminal professional degree, e.g. a Master's Degree from a Library School accredited by the American Library Association.

In November 1979, the position in question was advertised in various national library publications. The position in question was readvertised in various national publications in April 1980. Published job vacancy notices contained an entry level requirement of a Master's degree in Library Science from a library school accredited by the American Library Association. Applications were received from all parts of the nation and applicants were considered by a Search Committee of staff and faculty from the College of Veterinary Medicine and Mitchell Memorial Library. All applicants possessing the accredited degree were interviewed. No applicant without the accredited degree was interviewed. The person selected held the required accredited degree.

Plaintiff holds a Master's Degree in Education with major in Secondary Education. Plaintiff does not challenge the requirement of a Master's degree or any other requirements other than ALA accreditation.[2]

Plaintiff filed suit charging inter alia that the facially neutral accredited degree requirement had an adverse impact on women applicants.

The District Court found that the Plaintiff had failed to make a prima facie case of disparate impact against the University under Title VII of the Civil Rights Act of 1964.[3]

The District Court found that the Plaintiff attempted to establish a prima facie case of disparate impact by statistical analysis measured by *Connecticut v. Teal*, 457 US 440, 102 S. Ct. 2525 (1984), 73 L. Ed. 2d 130 (1972). The evidence did not reflect a statistical analysis which was relevant, material and meaningful, but was segmented, particularized and fashioned to obtain a desired conclusion. The District Court found that the relevant geographic labor market of potential applicants for the position was at least the continental United States, that in the past ten to twelve years approximately 50,000 accredited Master of Library Science degrees had been awared and that approximately eighty percent of these degrees had been awarded to women.[4]

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[2] T-253

[3] Appendix 60

[4] Appendix 58-66

The District Court found that while no prima facie case had been established, the Defendant had clearly established that the degree is a standard widely recognized by academic and professional employers. The District found that the evidence and stipulations precluded a finding that the requirement was a pretext.[5]

The Court of Appeals affirmed the Magistrate's holding that Plaintiff failed to establish a disparate impact claim and affirmed the finding that the accredited degree had a manifest relationship to the employment position.[6]

The Court of Appeals further affirmed that a manifest relationship to the employment in question had been clearly proved and that the accredited degree requirement is justified as a business necessity by the record.[7]

ARGUMENT

I.

DISPARATE IMPACT

With applications sought and reviewed from all parts of the United States, and with women holding approximately eighty percent of the required entry level degrees, Plaintiff attempted to fashion applicant

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[5] Appendix 56-57

[6] *Merwine vs. Board of Trustees*, 754 F.2d 631, 639, 640, (5th Cir. 1985)

[7] Merwine (supra) 754 F.2d 631, 641

flow statistics for the period 1970 to 1977. During the period selected by the Plaintiff, no graduate degree, accredited or unaccredited, was required.

The District Court found from stipulations and evidence that the relevant geographic labor market for potential applicants is at least the continental United States.[8] The District Court further found that the evidence establishes that in the past ten to twelve years approximately 50,000 ALA accredited MLS Degrees have been awarded nationwide, that approximately eighty percent of these degrees have been awarded to women.[9]

Plaintiff's thrust at establishing her prima facie case of disparate impact consisted of a statistical analysis of applicant flow data during a prior decade, relating to undefined positions, and consisting of approximately two hundred applicants over a seven year period. The applicant flow data included thirty-five women who held neither Plaintiff's qualifications nor the required qualifications.[10]

The District Court found that Plaintiff's statistical analysis was not probative, that the requirement did not select applicants for hire in a manner discriminatory to women, there being a great predominance of women ALA-MLS degree holders in the relevant job market. This case is unlike *Connecticut v. Teal* dealing with promotion where

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[8] Appendix 61

[9] Appendix 62

[10] Appendix 65

impact of the challenge requirement can be determined only by reference to those applying for promotion.[11]

The Court of Appeals noted that the Magistrate rejected Plaintiff's statistical analysis and found that the Plaintiff had failed to prove a prima facie case of disparate impact[12], holding that the District Court's finding was not clearly erroneous. The Court of Appeals further held that "... the evidence we adduced from the record leads us to believe that the Magistrate's finding that Merwine failed to prove her disparate impact claims was correct."[13]

On the issue of validation in terms of the Uniform Guidelines on Employee Selection Procedures, the District Court found that Plaintiff's statistical analysis was not probative and was insufficient to establish the prima facie case of disparate impact.[14] The District Court further found that when the applicant flow data relied on by the Plaintiff was properly limited to Plaintiff's individual claim it does not violate the four-fifths rule after eliminating women applicants who had neither Plaintiff's degree nor the required degree.[15] When the non-masters female applicants are deleted from the applicant data there is no violation of the four-fifths rule.[16]

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[11] Appenix 63

[12] Merwine (supra) 754 F.2d 631, 639

[13] Merwine (supra) 754 F.2d 631, 640

[14] Appendix 60

[15] *Payne v. Travenol Laboratories, Inc.*, 565, F.2d 895, 898-99, (5th Cir.) cert. denied, 439 U.S. 835, 58 L.Ed. 2d 131 (1978)

[16] Appendix 64, 65, 66

II.

STANDARD OF REVIEW

The standard of review applied in this case by the District Court and the Court of Appeals complies with the well settled standards laid down by the United States Court of Appeals for the Fifth Circuit for review of Title VII cases that have been fully tried on the merits. The three-step analysis of prima facie case, rebuttal and showing of pretext, does not remove Title VII cases from the standard of review applicable to all civil litigation. Where the case has been fully tried on the merits, the adequacy of a party's showing at any particular stage is of no particular consequence.[17] The ultimate issue, that of discrimination vel non, is to be treated by the District and Appellate Courts in the same manner as any other issue of fact.

In *U.S. Postal Service Board of Governors v. Aikens* 460 US 711, 716, 75 L.Ed. 2d 403, 411 (1983) the standard was stated:

> "But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry more difficult by applying legal rules which were devised to govern 'the basic allocations of the burdens and order of presentation of proof.' (citations ommitted).

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[17] *Williams v. Southwestern Bell Telephone Co.*, 718 F.2d 715, 717, (5th Cir. 1983)

The United States Court of Appeals for the Fifth Circuit has defined the proper standard of review in Title VII cases as the same standard guiding trial courts and appellate courts in other civil litigation, without necessity of discussing the elements of the three-step format or the state of the evidence at any of the stages of trial.[18]

After the Defendant has offered evidence of manifest job relatedness of the academic entry level requirement, Plaintiff had every opportunity to offer such proof as might be available to show that the requirement was a pretext. Plaintiff has not been put in a position of proving the absence of job relatedness but was properly under a burden of showing pretext if evidence of pretext was available. The District Court and the Court of Appeals exercised the proper standard of review in considering the ultimate question of discrimination vel non from the entire record.

III.

MAINFEST RELATIONSHIP OF THE REQUIREMENT

While the District Court and the Court of Appeals concur that the evidence does not support a finding of disparate impact, Plaintiff contends that the District Court and the Court of Appeals erred in finding job relatedness or business necessity.

In cases where a prima facie case of disparate impact is reached the burden shifting to the Defendant is well settled. Variously termed "manifest

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[18] *Reeves v. General Foods Corporation*, 682 F. 2d 515, 519, (5th Cir. 1982); *Elliott v. Group Medical and Surgical Service*, 714 F.2d, 556, 564, (5th Cir. 1983); *Williams*, supra; *Lyford v. Schilling* 750 F.2d 1341, (5th Cir. 1985).

relationship", "job relatedness" or "business necessity", the Courts have uniformally interpreted the requirement to be that only tests that were *job related* would be permissible despite their disparate impact. In *Connecticut v. Teal,* 457 U.S. 440, 452, 102 S. Ct. 2525, 2533, 73 L.Ed.2d 130, 140, (1982), the requirement is stated:

> "...we concluded that Congress in adding §703(h) intended only to make clear that tests that were *job related* would be permissible despite their disparate impact." (citations ommitted)

Footnote 8 of the Petition (Pet. 12) refers to a faculty member's testimony relating to four ladies employed in prior years without the ALA accredited degree at the time of their employment, who received promotions in the library. Each of the ladies had a decade or more experience in the library[19] and had been hired at a time where there was no graduate degree requirement. Two of the ladies referred to served on the faculty committee recommending adoption of the ALA-MLS degree policy in 1978 to the library faculty.[20]

The Court of Appeals found from the evidence in the record that the accreditation standard is particularly appropriate to insure not only that the applicant has received appropriate instruction and expertise but also that the institution from which the applicant has graduated fulfills recognized, objective academic standards[21]; that a review of applicants by

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[19] T. 565, T. 630

[20] T. 568, T. 631, where one of the ladies referred to chaired the committee.

[21] Merwine, supra, 754 F.2d 639-640

disinterested professionals of the institution from which applicants have graduated also insures the reliability and quality of the sponsoring institutions educational programs.[22]

While the record of evidence is replete with expert testimony particularizing selection problems and uncertainities in the absence of academic accreditation, it is not encumbent upon the Court of Appeals as a standard of review, to detail the evidence before it or to articulate beyond its findings of ultimate facts. Furthermore, the Court of Appeals' opinion has no effect on Plaintiff's burden of proof although the Plaintiff was at liberty to offer evidence in rebuttal of Defendant's proof of job relatedness or proof that it was pretexural.

The Court of Appeals properly addressed Plaintiff's contention that non ALA-MLS degree holders presently employed at Mitchell Memorial Library perform equally well with ALS-MLS degree holders during 1970 to 1977. The opinion reasoned correctly that the position at issue is an entry level position and stipulations as to previously employed employees does not necessarily lead to a conclusion that a standard, objective academic requirement would not better meet the needs of a librarian for the College of Veterinary Medicine.[23]

Notwithstanding the fact that eighty percent of the required accredited degrees are held by women, Plaintiff has asserted before the District Court and the Court of Appeals that the requirement will create an artificial bearer to employment for those few who might perform better than some applicant with an

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[22] Merwine, supra, 754 F.2d 640

[23] Merwine, supra, 754 F.2d at 639, 640

accredited degree. One of the factors referred to in the Court of Appeals decision was the fact that the University had only fulltime University people for volunteer Search Committee duties. The opinion referred to testimony, including Plaintiff's expert witness, that under such circumstances validation of subjective criteria would be questionable.[24] The opinion was careful to hold that convenience alone does not validate the University's imposition of the degree requirement, that the University's preference for an objective degree requirement is widely recognized by academic and professional employers and is a recognized standard among college and university libraries as a business necessity.[25]

No inference can be drawn from the District Court's opinion or the Court of Appeals' opinion that a new burden of proof is cast upon the Plaintiff by the adoption of a published, objective and related entry level academic requirement for professionals.

Neither the District Court nor the Court of Appeals hints that preferential treatment toward universities or the imposition of any different standard and would be applicable by comparison to other professions or business. While the objective requirements may vary between professional faculty and other non-academic professions, there is no contention by the courts or the defendants that the requirements should vary in principle.

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[24] Merwine, supra, 754 F.2d at 640

[25] Merwine, supra, 754 F.2d at 640-641

CONCLUSION

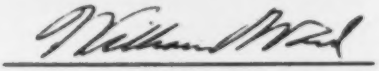
Plaintiff's disparate impact claim is based upon her charge that the facially neutral entry level accrediation requirement had an adverse effect on women whose applications were sought and received from throughout the United States. Approximately eighty percent of the accredited degrees are held by women. Any "headwind" effect of the requirement would logically impact against men.

As a result, Plaintiff attempted to fashion a small, segmented applicant flow data between 1970 and 1977 when no graduate degree requirements of any kind was in effect. By including applicants with no graduate degree Plaintiff attempted to show a violation of the "four-fifths" rule under the Uniform Guidelines on Employee Selection Procedures. As the District Court held and the Court of Appeals affirmed, the statistics were not relevant or meaningful. When the 1970-1977 women applicants with plaintiff's qualifications were compared to the required qualification, the four-fifths rule was not violated according to Plaintiff's own expert and other expert witnesses.

A manifest relationship of the accrediatation requirement to the faculty position is evident from the District Court and Court of Appeals opinion and is supported by the record almost without issue. Pretext is not an issue by reason of a lack of evidence of pretext and the fact that Plaintiff's application came substantially after the accreditation requirement was implemented.

Finally, this case is void of any novel, conflicting or unsettled legal issues. Both the District Court and the Court of Appeals has carefully followed well settled substantive law and standards of review.

Respectfully submitted,



William Ward

CERTIFICATE OF SERVICE

I, William Ward, Attorney for Respondents, do hereby certify that I have this day mailed postage fully prepaid, a copy of Brief of the Respondents in Opposition to Petition for Writ of Certiorari to the following:

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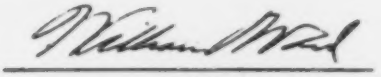
This 1st day of July, 1985.



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